No. 12866.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA and JAMES J. BOYLE, United States Marshal for the Southern District of California,

Appellees.

BRIEF OF APPELLANT.

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STATEMENT OF JURISDICTION.

This is an appeal from an order by the District Court of the United States for the Southern District of California, Central Division, denying appellant's Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code [R. 26] and from an order dismissing appellant's Petition for a Writ of Habeas Corpus [R. 33-34]. The questions presented in both appeals are identical, and the case is here on appeal on a common record pursuant to stipulation that the two causes be consolidated on appeal [R. 36]. The Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, appears at page 6 of the Record, and the Petition for Writ of Habeas Corpus appears at page 29 thereof.

The mandate of this Court was filed on January 19, 1951, affirming the conviction of the appellant on Count 3 of Indictment 20069 Cr. [R. 3] and the appellant was

committed to custody and his bond on appeal exonerated [R. 5].

Thereupon, appellant filed his Motion to Vacate and for Relief Pursuant to Section 2255 [R. 5]. The Court found that it was true that the defendant was now in the custody of the Attorney General of the United States, through his representative, the United States Marshal, in and for the Southern District of California. That it was true that he was being restrained of his liberty by virtue of said custody pursuant to a certain judgment entered by the United States District Court [R. 18].

The District Court allegedly had jurisdiction under 28 U. S. C., Section 2255, and 28 U. S. C., Section 2241, and this Court has jurisdiction under 28 U. S. C., Section 2255, and 28 U. S. C., Section 2253.

Thereafter, the appellant duly filed his separate Notices of Appeal from said orders within the time prescribed by law [R. 27, 35], and contemporaneously therewith appellant filed his Designation of Grounds on Appeal [R. 28, 36].

Thereafter, appellant filed within the time prescribed by law his Designation of Record on Appeal [R. 36, 37, 51] and his Statement of Points on which Appellant Would Rely on Appeal, together with the Designation of the Parts of the Record necessary for consideration of his appeal [R. 51].

Thereafter, the Record in this case, including the transcript of all of the testimony and all of the evidence, together with all of the exhibits, separately and directly certified, was filed with the Clerk of this Honorable Court, together with a Statement of Points to Be Relied Upon on Appeal [R. 50, 51].

STATEMENT OF THE CASE.

The Motion to Vacate and for Relief Pursuant to Section 2255.

The Motion is predicated on the ground that the sentence was imposed in violation of the Constitution and the laws of the United States; and that the Court was without jurisdiction to impose such sentence. The Petition appears at pages 6 and 17. It was stipulated that the appellant had been committed to custody [R. 38]. The Motion was supported by the files and records in the case and by reference was made a part thereof [R. 9-10]; also the affidavit of J. E. Siu [R. 9, 16] and the Opinion of this Court on the Supplemental Petition for Rehearing [R. 11] were offered in evidence upon the proceedings had on said Motion [R. 38, 5].

The Findings of Fact and Conclusions of Law.

The trial court found that defendant was personally present during the entire proceedings and represented by counsel; that on the hearing of the defendant's Motion the Court received documentary evidence consisting of a copy of the affidavit of J. E. Siu [R. 16], a copy of the Opinion of this Court on the Supplemental Petition for Rehearing, defendant's verified Motion and the files and records of the case; that the sentence imposed upon the defendant herein was not in violation of the Constitution and not in violation of the laws of the United States, and the Court had jurisdiction to impose said

sentence; that it was true that the defendant was now in the custody of the Attorney General of the United States and was being restrained of his liberty by virtue of said custody pursuant to the judgment entered by the United States District Court for the term of one year, which is the judgment complained of in the Motion respecting which the Findings are made; that it is true that the defendant was convicted on Counts 1 and 3 of Indictment designated as No. 20069 and Indictment No. 20604, each count charging the defendant with violation of Section 746(a)(18), Title 8, of the United States Code; that it is true that the defendant was sentenced by the trial court to one year on each of said counts, that said sentences were to run concurrently, and that he was sentenced to pay a fine of $1,000.00 on each of said counts; that it is true that the case was appealed to the United States Court of Appeals for the Ninth Circuit, and that said Court reversed the sentence on Count 1 of Indictment No. 20069 and on Indictment No. 20604; that it is true that the United States Court of Appeals affirmed the judgment of conviction on Count 3 of Indictment No. 20069; that it is true that the defendant petitioned the United States Supreme Court for a Writ of Certiorari as to the affirmed count, and that the same was denied; that it is true that thereafter defendant filed a Supplemental Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit, and that thereafter the said Court of Appeals transmitted its mandate to the trial court, and that said mandate has been received and spread upon the

minutes of the records of the trial court, and that a certified printed copy of the Opinion of the Court of Appeals on said Supplemental Petition for Rehearing is attached to the Motion [R. 11, 17, 20].

That it is not true that the defendant stands convicted of an offense not charged; that there was no material variance between pleading and proof; that defendant had a fair trial wherein there was no denial or infringement of his constitutional rights and no violation or infringement of any of his legal rights; that the evidence adduced at the trial supports the judgment [R. 24].

The Court found, as a conclusion of law, that the Motion to Vacate is without merit, that the defendant is properly imprisoned, that he is not entitled to be released upon any of the grounds in his Motion, and that there are no conditions existing to entitle him to relief pursuant to Section 2255, and that his Motion should be denied [R. 25].

Petition for Writ of Habeas Corpus.

Upon the entry of the order denying the Motion to Vacate Pursuant to Section 2255, the appellant filed his Petition for Writ of Habeas Corpus which made the same allegations as set forth in his Motion to Vacate [R. 26, 29]. The Petition for Writ of Habeas Corpus made reference to the Motion and by reference adopted the record of that case and the matters referred to in the Motion [R. 43].

Specifications of Error Upon Which Appellant Will Rely.

The trial court erred in its findings of fact and conclusions of law in that the sentence imposed was in violation of the Constitution of the United States for the following reasons:

(a) Proof of a distinct false representation of citizenship from the one charged, as here, is insufficient to support a conviction, in that it is in violation of the Sixth Amendment which states: "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; and (b) is a denial of due process as guaranteed by the Fifth Amendment of the Constitution."

The trial court erred in dismissing defendant's Motion Pursuant to Section 2255.

The trial court erred in its Findings of Fact and Conclusions of Law on said Motion Pursuant to Section 2255.

The trial court erred in granting respondent's Motion to Dismiss Petitioner's Application for Writ of Habeas Corpus.

ARGUMENT.

The Court Was Without Jurisdiction to Impose Sentence for the Following Reasons: (a) That Proof of a Distinct and False Representation of Citizenship From the One Charged, as Here, Is in Violation of the Sixth Amendment; and (b) Is a Denial of Due Process Guaranteed by the Fifth Amendment.

This case has been before this Honorable Court on appeal, and on two Petitions for Rehearing, and therefore much that would necessarily be said to acquaint the Court with the record becomes unnecessary. We are here again because we feel keenly that the Court has made a mistake on a matter which affects fundamental constitution rights. The protracted litigation probably is counsel's fault because of not writing with due clarity. We are therefore here again engaging in an attempt to persuade the Court to re-examine the issues as we perceive them to exist.

On the Supplemental Petition for Rehearing, this Court did the unusual thing of entertaining the same and writing an Opinion because it felt the "contention that the crime charged in the indictment was separate and distinct from that upon which appellant was tried and convicted, and that appellant was not aware of the variance until a very late date" merited a consideration of the Petition. The Court in this Opinion is in agreement with our contention of the facts in the case when it states:

> "The third count charged the misrepresentation of citizenship to have been made to one Siu, a deputy sheriff of Los Angeles, California. The evidence

disclosed that the false statements with which appellant was charged were made in the course of a booking operation at the Sheriff's office, after an arrest. The answers were recorded on a form sheet provided for that purpose. *It appears that the lower portion of the form which contains the false statement was filled in by Deputy Sheriff Hopkins, not Siu and that Siu did not hear the false answers."**

Then this Court said immediately following the above statement:

"Hence, it is argued that a fatal variance exists between the allegation and proof."

This, we respectfully suggest, is an over-simplification of our position. However, this Court did predicate its Opinion solely upon the premise of whether a fatal variance existed between the allegation and proof, saying:

"The true inquiry is not whether there has been a variance but was it such as to affect the substantial rights of the accused. Berger v. United States, 295 U. S. 78, 82; United States v. Regan, 314 U. S. 513, 526. 'No variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial.' Washington & Georgetown R. Co. v.

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*For convenience we have set forth in an Appendix the Record facts.

> Hickey, 166 U. S. 521, 531. In a criminal case there must 'be added the further requisite that the variance be not such as to deprive the accused of his right to be protected against another prosecution for the same offense.' Berger v. United States, *supra,* p. 83."

The Court further added:

> "In the instant case we have a variance in names. . . . It is evident that the same defense would have been made had Hopkins been named in the indictment."

We respectfully urge that the Court re-examine the *Berger* case because we feel that the basic question is totally different than the one presented here. In the *Berger* case, it will be remembered that under the indictment the same conspiracy could have been proven against either group. The shoe actually fitted the foot. Either group of defendants could have been tried under that indictment precisely as the charge was laid. There, each group of defendants was actually convicted of the identical and precise charge made in the indictment. As the Court said in the *Berger* case, *supra,* at page 81:

> "In the present case, the objection is not that the allegations of the indictment do not describe the conspiracy of which petitioner was convicted, but, in effect, it is that the proof includes more."

Our complaint here is not that the "proof includes more," but that it is proof of a distinct charge not made, and that proof of the cardinal allegation in the indictment of a false representation of citizenship to Siu was not made at all.

The Court in the *Berger* case, continuing, says:

> "If the proof had been confined to that conspiracy, the variance, as we have seen, would not have been fatal. Does it become so because, in addition to proof of the conspiracy with which petitioner was connected, proof of a conspiracy with which he was not connected was also furnished and made the basis of a verdict against others. . . . The proof here in respect of the conspiracy with which Berger was not connected, may, as to him, be regarded as incompetent . . . and . . . the fact that the proof disclosed two conspiracies instead of one, *each within the words of the indictment,* cannot prejudice his defense of former acquittal of the one or former conviction of the other."

Could the Government have supported this Count 3 by Hopkins' testimony alone? It would be proof of the *cardinal element* of a false representation to a person other than the indictment charges. Could the trial court have amended the indictment and substituted Hopkins' name for that of Siu? The trial court, of course, could not amend the indictment. There can be only a fictional difference between calling it a variance of names and an indictment amended. Submitting the case to a jury under these circumstances would be as effective as doing the unconstitutional thing of amending the Indictment because the results would be identical. In fact, counsel couldn't even have consented to the substitution of Hopkins' name for that of Siu.

Let's take the converse of the above inquiry, *i. e.,* that Hopkins had not testified, and that the conviction on the third count rested solely on the testimony of Siu, and that this Court had held that the Government's theory of birth

and life in the United States was sufficient to support a charge of false representation; could the appellant plead the conviction in a subsequent prosecution for having made a direct false representation that he was a United States citizen to Hopkins and out of the presence of Siu?

We earnestly feel that the answer would have to be "no." We feel that the basic question here is not a mere case of variance of names, but is a case of variance of offenses charged. It is not a case of charging an incorrect name, *i. e.,* Siu being known by another name. Our case is not one of names but of two distinct persons.

Further, we respectfully refer again to the *Berger* case, where it was held that under that indictment the plus evidence in the case would be regarded as incompetent. Hopkins' testimony, in the light of the observations in the *Berger* case, being considered incompetent, there is no proof remaining of any offense.

If appellant's counsel could not consent to the substitution of the name of Hopkins for Siu's in the indictment, then it cannot be done by judicial action. Neither could he be tried for having made the false representation to Hopkins rather than to Siu under the indictment alleging that it was made to Siu. We again refer this Honorable Court to and request a re-examination of your own decision in *United States v. Edgerton,* 143 F. 2d 697, in which it was held that deleting a portion of the indictment by instruction with reference to one of the alleged false representations was fatal, and resulted in the trial of the defendants on a charge different from that found by the grand jury. In that case, the assignments of error was that the trial court erred in overruling the motion for an order arresting judgment on the grounds that: (a)

The purported verdict returned by the jury is not a verdict based upon the indictment returned by the grand jury; (b) The Court had no jurisdiction to impose judgment and sentence upon an indictment amended by him; (c) The Court altered and amended the indictment by striking therefrom the language contained therein, "Theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations."

Ever since the decision in *Ex parte Bain,* 121 U. S. 1, the rule has been firmly settled in the Federal courts that no power exists in the trial court to alter, amend, delete, *or add* to an indictment presented by a grand jury, and that a conviction upon such an amended or altered indictment is void.

This Court, in the case of *Stewart v. U. S.* (C. C. A. 9), 12 Fed. 524, 525, had occasion to consider this precise question, and held that where an indictment for the crime of smuggling charged that defendants did knowingly, willfully, unlawfully, and feloniously, etc., and with intent to defraud, etc., bring into the United States certain intoxicating liquors, it was fatal error for the trial court to strike out as surplusage the word *"feloniously."* This Court said:

> "At the commencement of the trial, *by consent of counsel* for all parties, the court *struck from the* body of counts 2 and 3 of *the indictment, as surplusage,* the words 'feloniously and' in one place, and the words 'and feloniously' in another. This action on the part of the court is now assigned as error. The assignment is well taken. In *Ex parte Bain,* 121 U. S. 1, 13, 7 S. Ct. 781, 787 (30 L. Ed. 849), the trial

court struck six words from the indictment, as surplusage, and in discharging the petitioner on habeas corpus the Supreme Court said:

"'It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. *We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury.* The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. . . . the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. . . . The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence.'

"In the course of the opinion there is some discussion of the question as to whether the grand jury

would have returned the indictment with the stricken words omitted, but an examination of the entire opinion shows very clearly that the decision was based upon the broad ground that under English and American law no authority exists in a court to amend any part of the body of an indictment, without reassembling the grand jury, unless by virtue of statute.

"In Dodge v. United States, 258 F. 300, 169 C. C. A. 316, 7 A. L. R. 1510, certain words were likewise stricken from the indictment as surplusage, and, in holding that such action on the part of the court avoided the indictment, the Circuit Court of Appeals for the Second Circuit said:

" 'At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word "mutiny" from the first paragraph of the second count. Counsel for defendant at once said: "No objection." The court granted the motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted. The rule is almost universally recognized, both in this country and in England, that an indictment cannot be amended by the court, and that an attempt to do so is fatal to a verdict upon the count.' . . .

"So here the amendment of the indictment avoided the second and third counts, but did not affect the convictions under the remaining counts unless some other error intervened."

In the case of *Ex parte Bain, supra,* 121 U. S. 1, 5, 9, the indictment charged a violation of the statute making it a crime to give any false report or statement of the banking association with intent to injure the association or any other company or individual or to deceive any officer of the association or any agent appointed to examine the affairs of such association. The indictment charged an intent to deceive the *comptroller of the currency* and the agent appointed to examine the affairs of said association and to injure, etc., the United States, etc. Upon demurrer, the trial court had ordered the italicized words deleted. *The conviction was set aside on habeas corpus,* the Supreme Court holding that the indictment on which defendant was tried was not the indictment of the grand jury. There was nothing before the Court on which it could hear evidence or pronounce sentence.

The rule of the case of Ex parte Bain has never been departed from and was reaffirmed by the Supreme Court in the case of *U. S. v. Norris,* 281 U. S. 619-622, 74 L. Ed. 1076, 1077, where the Court held that a stipulation of facts was ineffective to import an issue as to the sufficiency of the indictment or an issue as of fact upon the question of guilt or innocence after plea of *nolo contendere,* the Court saying:

> "If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found. *Ex parte* Bain, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 16 Am. Crim. Rep. 122. If filed before plea and given effect, such a stipulation would oust the jurisdiction of the court."

It has been held that the district attorney, where an indictment is attacked as duplicitous, may not elect to rely upon one of the offenses charged and *nolle pros.* the others, as this would in effect constitute an amendment of the indictment. *U. S. v. Dembowski,* D. C. Mich., 252 Fed. 894-898:

> "It seems clear that, if the District Attorney is permitted to *nolle pros.* a portion of this indictment, he will thus, in effect, be permitted to amend it, because, in that event, the indictment on which the defendant is tried will not be the same as that found by the jury. . . . To amend is to 'free from error'; to 'remove what is erroneous, superfluous, faulty, and the like.' 2 Corpus Juris, 1317. In Words and Phrases, vol. 1, First Series, at p. 368 *et seq.,* and in vol. 1, Second Series, at p. 199 *et seq.,* numerous authorities are cited and quoted showing that an amendment may consist of either the addition to, or the withdrawal from, a pleading or document of a part thereof."

In *Naftzger v. U. S.* (C. C. A. 8), 200 Fed. 494, 496-497, it was held that although it was unnecessary that the indictment for receiving stolen stamps should have specified that they were stolen from "certain post offices in the State of Kansas," *nevertheless the indictment having so specified, the descriptive words could not be stricken as surplusage.* The Court said:

> "Counsel for the government contend that the recital of the indictment that the stamps were stolen from 'certain post offices in the state of Kansas' is surplusage, and need not be proven, and that it sufficed if made to appear that they were stolen elsewhere from the government. We are of the opinion

that, if the allegation had omitted the words quoted, it would have been sufficient; *but, having been alleged, the evidence must conform to and support the allegation.* The return of an indictment is the work of the grand jury only—a co-ordinate branch of the court." (Emphasis ours.)

After referring to *Ex parte Bain* the Court said:

"It was conceded that there was no necessity to allege that the Comptroller was deceived, as we concede that it would be a crime to knowingly receive stolen stamps from wheresoever stolen from the Government. *But it is alleged that the stamps were stolen within the state of Kansas.*

"An indictment is for the purpose of conferring jurisdiction and advising the court of the charge, and to advise the defendant of what he must meet; and if, after thus advising the defendant that the stamps were stolen in Kansas, the government can be allowed to show that they were stolen in some other state, such an allegation is misleading, and can be used as a snare to deceive a prisoner."

In all the foregoing cases the matters deleted were not in themselves substantial or material, except that the grand jury, in framing the indictment in those particular terms, had constituted such terms material. In our case it is Siu, not Hopkins, who is the person the indictment charges the false representation was made.

The United States Supreme Court in reversing *Thornhill v. State of Alabama,* 310 U. S. 87, 96, 84 L. Ed. 1093, 1099, said:

"Conviction upon a charge not made would be a sheer denial of due process."

To the same effect, see *De Jonge v. Oregon,* 299 U. S. 353, 81 L. Ed. 278, 57 S. Ct. 355; *Stromberg v. California,* 283 U. S. 359, 368, 75 L. Ed. 1117, 1122, 1123.

See:

Oddo v. U. S., 171 F. 2d 854, 857 (C. C. A. 2).

We feel that we were not called upon to defend as to Hopkins. We were not confronted with—nor did we know about—Hopkins until the trial. We feel that this Court has overlooked some phases of the record when it says that "trial counsel for appellant relied on the theory that no crime had been committed because the person to whom the false representations were made had no right to ask the questions." We did not rely upon any such theory ourselves, but were driven in the course of the trial to that position because the trial court and the Government tried the case upon the theory that birth and life in the United States alone supported the charge. In consequence the testimony of Hopkins on the distinct and direct representation at a different time and place was immaterial. The most that can be said of it is that it was incompetent as showing a separate offense.

We earnestly request the Court to refer to the Record because it is mistaken in this regard, as we challenged at the appropriate occasion, on a motion for a directed verdict of acquittal, the proposition of the Government that evidence of birth in the United States and having lived in the United States established a violation of the

statute. In that argument, challenging the sufficiency of the evidence, we find the record discloses the following:

"Mr. Christensen: . . . The mere negative statement of birth does not in itself establish that. The burden would be on the government to show that there was an affirmative representation and claimed citizenship.

"We know that at one time Indians, although native-born, were not citizens.

"We also know that children of the Diplomatic Corps were not citizens. We also know that there is such a thing as repatriation in spite of the fact that one may be or had been a native-born citizen." [R. 163.]

"The Court: . . . Do you think the allegation as to citizenship is proved by proof that the defendant made a statement that he was born in the United States." [R. 196.]

"Mr. Tolin: . . . I take it that is what your Honor has in mind and the statement as to Mr. Siu . . . maybe as to that Siu count there might be a question . . . After he had stated to Mr. Siu that he had been in the United States all of his life, which would mean that he had been a citizen unless he was a child of some diplomat, and I think Mr. Christensen suggested that that was a legal possibility in these cases, that would put him in the class of those defendants who having peculiar knowledge of an exception have to prove the exception rather than the government negativing the exception . . . unless he is the child of some diplomat who was here in the diplomatic service, he could

not have been born in the State of New York and be in this country all his life without being a United States citizen." [R. 199.]

The foregoing establishes beyond cavil that the question was squarely before the trial court, and also that the trial court by its own question was cognizant of it.

The trial court overruled our Motion challenging the sufficiency of the evidence and compelled us in defense to move to the theory that the persons to whom it was alleged the false representations were made were not persons having a legal right to ask the questions in furtherance of legal authority. The Hopkins testimony was unimportant in view of the theory adopted by the trial court, but when the case was reversed by this Court on the ground that birth and life in the United States was insufficient, it then assumed a position of grave importance in the light of this Court's holding that Hopkins' testimony gave the supporting proof to Count 3.

The Petition for Writ of Habeas Corpus presents precisely the same questions as presented under the Motion Pursuant to Section 2255. The Petition for Habeas Corpus was filed after the taking of the proper steps under the Section 2255 because we felt that there was some grave doubt as to the constitutionality of that section. We submit the Petition for Writ of Habeas Corpus upon the argument made with respect to the Motion under said section.

Conclusion.

We feel, in the interest of justice, that the Order of the Court denying relief under Section 2255 should be reversed with directions to grant the appropriate relief under that section, or in the alternative the order of the trial court denying the Petition for Writ of Habeas Corpus should be reversed with directions to issue the writ and discharge the appellant.

Respectfully submitted,

Otto Christensen and
Jerry Giesler,
Attorneys for Appellant.

APPENDIX.

There was no evidence whatsoever that appellant made any representation of United States citizenship to Siu, or that Siu was present when any representation of United States citizenship was made.

Siu testified that he, together with other officers, arrested petitioner and took him to their office located at 414½ North Hill Street, Los Angeles; that at that place he booked him on a charge of violating 836-3 of 337-A; that he made out an arrest slip which contained his name, address, date of arrest, complexion, weight and height, and years lived in County, in the State and in the United States. To the question, "How long in the United States?" the petitioner answered "Life." [R. 81-82.]* This was the content of "Exhibit 4" and were the questions asked and answers given by the petitioner at 414½ North Hill Street, Los Angeles. On the top portion of "Exhibit 5" which bears Siu's signature is the same information that is on the arrest slip. Siu testified that this information was taken off of the arrest slip by a clerk at the County Jail later from the arrest slip. [R. 84.] When asked if he had any other conversation with the Petitioner in the course of either the arrest or the transfer to jail, or his interviews with him in connection with the alleged offense concerning petitioner's citizenship, he answered, "No other conversation other than what I asked him when I made out the arrest slip." [R. 85.]

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*The Record pages referred to in the Appendix are to the original printed Record on Appeal in Case No. 12375, which Record was offered and received in evidence upon the hearing of the motion and petition and is separately certified.

The witness, Hopkins, testified in response to the questions of the United States Attorney on direct examination that he first filled out the upper part of "Exhibit 5" above the signature of Mr. Siu and that then Mr. Siu went away. [R. 121-122.] That after the departure of Mr. Siu from the County Jail he then filled out the remainder of "Exhibit 5" which contained the question, "United States Citizenship?" and the answer "Yes." [R. 123.]

That Siu was not present at the time the representation was made we say is clear from the record; in addition thereto, we have filed an Affidavit of said government witness, Jacob E. Siu, concurrently herewith which reads as follows:

> "That at no time did I ask the question appearing in Exhibit 5, 'United States Citizen?' of Mr. Smiley, neither at the time of my interviewing him at 414½ North Hill Street, on or about the 25th day of May, 1944, or later that day at the County Jail booking office in the presence of Milton S. Hopkins, Deputy Sheriff, or at any other time hear such a question put to Mr. Smiley; Neither on said day, or at any other time, did Mr. Smiley say to me that he was a citizen of the United States, nor did I hear him say so to any other person.
>
> s/ Jacob E. Siu.
>
> Subscribed and sworn to before me this 19th day of October, 1950.
>
> s/ Minnie F. Chetwood,
> Notary Public in and for the County of Los Angeles, State of California."

Unequivocally, the record is that the Petitioner stands convicted of a distinct and separate offense not charged. He stands convicted of having represented to another person (Hopkins), at another time and place, that he was a United States citizen, whereas the indictment charged that he made the false representation of United States citizenship to Siu; and the proof is that it was at another time and place than the incident with Hopkins that Siu interviewed him, at which interview nothing whatever was said about United States citizenship.